

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION No. 4190 OF 2013

Mr. Vinod Kanabar of Mumbai
Aged about 61 years, adult,
Indian Inhabitant,
residing at 128/130, Walkeshwar,
Waid Mahal, Mumbai 400 006.

..Petitioner.

Versus

1. State of Maharashtra
through Byuclla Police Station.

2. Sudhakar Shankarrao Suradkar,
returnable on 801, "Bullet" Gazetted
Police Officers CHS Ltd, L. N. Road,
Hindu Colony, Dadar (E), Mumbai 19.

..Respondents.

Mr. K. H. Holambe Patil for the Petitioner.
Mr. K. V. Saste, learned APP for the State.
Mr. S. S. Suradkar, Respondent No. 2 in-person.

Coram : RANJIT MORE &
V. L. ACHLIYA, JJ.

Date : **December 9, 2015.**

Oral Judgment (Ranjit More, J.) :

1. Rule. Rule is made returnable forthwith. Since controversy involved in the petition is in narrow compass, by consent of the parties, petition is taken up for final disposal.

2. Heard Mr. Patil, learned Counsel appearing for the

Petitioner, Mr. Saste, learned APP for the State and Mr. Suradkar, Respondent No.2 in-person.

3. The petition is filed invoking the jurisdiction of this Court under Article 226 of the Constitution of India as well as under section 482 of the Code of Criminal Procedure, 1973, seeking to quash the proceedings of CC No.73/PS/14 pending on the file of 25th Metropolitan Magistrate, Mazgaon, Mumbai.

4. The case of the Petitioner is as under :

That, on 28th November 2006, a defamatory article with the Petitioner's photograph was published in the morning edition of Mumbai Mirror. In the said article, the Petitioner is labelled as extortionist and most litigious who is alleged to have filed 182 cases against high profile persons including the top-most police officers. The Petitioner thereafter on 6th March 2007, having got information of the said article from the friends and relatives filed private complaint against the said newspaper, its editor, reporter and publishers in the Court of 17th Metropolitan Magistrate, Mazgaon, Mumbai for the offence punishable under sections 329, 382, 465, 466, 469, 500, 502 and 501 read with 34 of the Indian Penal Code, 1860, which is numbered as Case

No.22/Misc./2007. In this complaint, the Petitioner as well as three witnesses, namely, Dinesh Anilkumar Kanbhar, Jatin Anilkumar Kanbhar and Vipul Kanbhar have been examined. The said case is still pending.

. That, on the basis of 2nd respondent's report dated 17th October 2013, Byculla Police Station on 22nd October 2013 registered an FIR against the Petitioner for the offence punishable under section 309 of the Indian Penal Code, 1860. This FIR is registered on the basis of the averment made by the Petitioner in his private complaint filed before 17th MM Court Mazgaon being CC No. 22/Misc/2007 wherein in paragraph 3 of the said complaint, the Petitioner has stated that "*then found out a domestic knife put on his neck and cut off it and commit suicide, his nephews snatched the knife and tried to save him from grievous injuries*". It is further alleged that witnesses Dinesh, Jatin and Vipul also deposed in support of the complaint filed by the Petitioner and stated that their uncle was to cut the veins of his hands. After completion of investigation, on 23rd October 2010 charge-sheet was filed by the police in the Court of Metropolitan Magistrate, 25th Court, Mazgaon, Mumbai. The

Magistrate took cognizance of the offence on the day of filing of charge-sheet.

5. The Petitioner has approached this Court for quashing of the proceedings of this case mainly on the ground that learned Metropolitan Magistrate could not have taken cognizance of the offence as the charge-sheet is filed after the lapse of the period of limitation. In this regard, learned Counsel appearing for the Petitioner relied upon the provisions of sections 468 and 469 of the Code of Criminal Procedure, 1973 [for short "*the Code*"] as well as decision of the Delhi High Court in *Saregama India Limited vs. State NCT of Delhi* [Manu/DE/0284/2014].

6. Learned APP for the State and Respondent No.2 in-person did not seriously dispute that cognizance of the offence is taken by the Magistrate after the period of limitation prescribed under section 468 of the Code. However they strongly relied upon the provisions of section 473 of the Code to submit that the delay can always be condoned by the Magistrate even after the expiry of period of limitation. They relied upon the decision of Apex Court in *Sukhdev Raj vs. State of Punjab* [1994 Supp (2) SCC

398].

7. Having gone through the petition, charge-sheet which is sought to be quashed and set aside by this petition and having considered the rival submissions advanced by both sides, we find merit in the petition. Admittedly, the subject FIR is filed on the basis of averments made by the Petitioner in his private complaint against Mumbai Mirror, its Reporters and Publishers, being Case No.22/Misc/2007 and the deposition of the witnesses examined in the said case. The said private complaint is filed by the Petitioner on 6th March 2007 and in paragraph 3, averment is made that the Petitioner allegedly attempted to commit suicide on 28th November 2006. The subject FIR is registered on 22nd November 2013 on the basis of 2nd respondent's report dated 17th November 2013 and the Magistrate has taken cognizance of the offence on 23rd January 2014.

8. The offence under section 309 of IPC is punishable with the imprisonment for a term which may extend to one year or with fine or with both. In terms of sub-section (2) of section 468 of the Code, the period of limitation for taking cognizance of the offence punishable under section 309 of IPC is one year.

Section 469 deals with the commencement of the period of limitation. The period of limitation commences from the date of offence or where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, from the first day on which such offence comes to the knowledge of such person or to any police officer whichever is earlier. Clause (8) of the subject FIR deals with the reasons for delay in reporting the offence by Complainant or informant. The said clause in the FIR is kept blank. Thus, the FIR as well as charge-sheet is silent about when Respondent No.2 or the police officer got knowledge about the alleged offence committed by the Petitioner nor any reasons are given for delay in reporting by the Complainant or informant. In these facts it is clear that the offence punishable under section 309 is alleged to have been committed by the Petitioner on 28th November 2006 of which learned Metropolitan Magistrate has taken cognizance on 23rd January 2014, i.e., almost after 7 years, which is certainly beyond the period of limitation as contemplated under section 468 of the Code.

9. The Apex Court in State of HP vs. Tara Dutt [(2000) 1

SCC 2301 has held that the discretion conferred on the Court under section 473 of the Code to take cognizance after the period of limitation under the conditions specified therein has to be exercised judicially and on well recognised principles. Wherever the Court exercises the discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect, it is not permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay. The relevant portion of judgment is as under :

7. [Section 473](#) confers power on the Court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore in respect of the offences for which a period of limitation has been provided in [Section 468](#), the power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognised principles. This being a discretion conferred on the Court taking cognizance, where-ever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to

that effect it may not be permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence.”

10. In similar circumstances, the cognizance taken by the JMFC Malegaon was set aside by this Court in Khalid Akthar Abdul Latif Ahemi vs. State of Maharashtra [2010 All MR (Cri) 2574]. The relevant observations of the learned Single Judge of this Court are as follows :

“11. Taking into consideration all the facts and circumstances and the legal position, it is clear that as the prosecution never made a request for condonation of delay by giving any valid reason either in the charge-sheet or by separate application nor the learned Magistrate has indicated anywhere that was satisfied about the reasons for the delay or that it was in the interest of justice to take cognizance beyond the period of limitation, it cannot be said that the power under Section 473 to extend the period of limitation was actually exercised by the concerned Magistrate. If that power was not exercised and the period of limitation was not extended, the charge-sheet could not have been filed beyond the period of limitation of 3 years which had expired on 25.10.2005. Therefore, the Court could not take cognizance of the case beyond period of limitation in view of the specific provisions of Section 468(1) Cr. P.C. This aspect has not been considered by the learned Magistrate while rejecting the application Exhibit 7.”

11. The learned Single Judge of the Delhi High Court had an occasion to consider the issue similar to the issue involved in the present writ petition. The Delhi High Court relying upon the

decision of the Apex Court in *Tara Dutt's case (supra)*, quashed the criminal complaint.

12. Learned APP heavily relied upon the decision of the Apex Court in *Sukhdev Raj (supra)*. In that case, the Appellant had been committed under section 9 of the Opium Act and sentenced to suffer 3 years RI with fine. In an appeal before the High Court, it was argued that the cognizance of the offence could not have been taken as the offence was alleged to have been committed on 31-5-1974 and challan was filed on 29-8-1977, i.e., after the period of limitation prescribed under section 467 of the Code. The High Court held that in the facts and circumstances of the case, the Court can take cognizance if the delay has been properly explained and that it is necessary to do so in the interest of justice. Thereafter the Appellant approached the Apex Court by filing an appeal, however the same also came to be dismissed. The Apex Court observed that in any event in this case an application was filed for condoning the delay and also explaining the same at a later stage. Ratio of this decision, in our considered view, cannot be made applicable to the present case. In a case before the Apex Court a specific application was

filed for condonaion of delay and that was condoned by the Magistrate. In the present case, as stated earlier, the FIR as well as charge-sheet is silent about the date on which Respondent No. 2 got knowledge of the alleged offence. No explanation is given in the FIR about the delay nor even at the time of filing of the charge-sheet. Respondent No.2 has also not filed any application for condonation of delay even at the time of filing of charge-sheet or even thereafter. The order taking cognizance of the offence also does not reflect that the delay has been condoned by the Magistrate before taking cognizance. There is nothing on record to show that learned Metropolitan Magistrate has considered it necessary to condone the delay in the interest of justice. In these circumstances, it cannot be said that power under section 473 of the Code extending the period of limitation has been exercised. Learned Magistrate could not have taken cognizance of the offence as it has been done in the present case. In view of the above, petition deserves to be allowed. Hence, rule is made absolute in terms of prayer clauses (b) and (c).

[V. L. ACHLIYA, J.]

[RANJIT MORE, J.]